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The Northeast Utilities System

Robert A. Bersak

Assistant Secretary and Assistant General Counsel

October 23, 2008

Ms. Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 Fruit Street, Suite 10
Concord, New Hampshire 03301

**Re: *Docket No. DE 08-103, Public Service Company of New Hampshire
Merrimack Station Scrubber Project -- Request for Information***

***PSNH Objection to Motions for Rehearing of TransCanada Hydro Northeast, Inc. and
Certain Commercial Ratepayers***

Dear Secretary Howland:

Pursuant to Rule Puc §203.07(f), Public Service Company of New Hampshire (hereinafter "PSNH") hereby submits its Objection to the Motion for Reconsideration and Rehearing filed by TransCanada Hydro Northeast, Inc. (hereinafter "TransCanada") and the Motion for Rehearing filed by Certain Commercial Ratepayers.

PSNH notes that subsequent to the filing of their Motions for Rehearing, both TransCanada and the Certain Commercial Ratepayers have filed motions requesting the Commission to suspend Order No. 24,898. PSNH has not addressed those suspension motions in this filing, and reserves the right to respond to those motions pursuant to Rule Puc §203.07(e).

Sincerely,

Robert A. Bersak
Assistant Secretary and
Assistant General Counsel

cc: Service List, Docket No. DE 08-103
Douglas L. Patch, Esq.
Edward A. Haffer, Esq.
Edward M. B. Rolfe

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire
Merrimack Station Scrubber Project
Request for Information

Docket No. DE 08-103

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S
OBJECTION TO MOTIONS FOR REHEARING
OF
TRANSCANADA HYDRO NORTHEAST, INC.
AND
CERTAIN COMMERCIAL RATEPAYERS

Pursuant to Rule Puc §203.07(f), Public Service Company of New Hampshire (hereinafter “PSNH” or “the Company”) hereby objects to the Motion for Reconsideration and Rehearing filed by TransCanada Hydro Northeast, Inc. (hereinafter “TransCanada”) and the Motion for Rehearing filed by Certain Commercial Ratepayers. Neither Motion alleged sufficient good reason for rehearing or reconsideration; therefore they should be denied. RSA 541:3. In support of this Objection, PSNH says the following:

I. Introduction

This docket involves the mandate placed on PSNH by 2006 N.H. Laws Chapter 105 to install scrubber technology at its Merrimack Station. The Commission correctly found in Order No. 24,898, dated September 19, 2008, (the “Order”), that it “lacks the authority to make a determination pursuant to RSA 369-B:3-a as to whether this particular modification is in the public interest.” Order, slip op. at 13. The Commission’s legal analysis leading to that conclusion was detailed and comprehensive. There is no basis for the Commission to assert authority in a matter where the law plainly does not call for it and where the Commission itself has correctly determined that it lacks such authority.

Virtually all of the grounds for rehearing contained in the two Motions for Rehearing were previously addressed by PSNH in its Memorandum of Law. PSNH incorporates the contents of its Memorandum of Law into this objection to address those matters.

II. PROCEDURAL ISSUES

A. Standing

1. General

It should be noted that one Motion for Rehearing was filed by a merchant generator and the other by certain commercial retail customers of PSNH. However, both groups state that the underlying basis for their Motions is the fact that the actual as-bid cost of the scrubber is higher than initial cost estimates made approximately three years earlier. If the higher price for the scrubber is the underlying reason for the Motions, PSNH cannot understand how both a merchant generator AND customers are harmed. The motivation for TransCanada's interest in this proceeding is suspect, as a higher price for the scrubber would benefit unregulated competitors, not harm them. The Commercial Ratepayers' alleged harm is also illusory, as they have the ability and right to purchase their electricity from a competitive supplier if they deem the costs of this significant emissions reduction project to outweigh the benefits that the Legislature specifically enumerated. *See*, RSA 125-O:11. The ability of a party to participate in a proceeding just because it is interested in doing so was addressed in detail by both the U.S. District Court and the U.S. Court of Appeals for the First Circuit in *PSNH v. Patch*, 173 F.R.D. 17 (D.N.H., 1997) and 136 F.3d 197 (1st Cir, 1998), respectively.

2. TransCanada

TransCanada Hydro Northeast, Inc. is neither a party nor a person directly affected by the decision. RSA 541:3. By letter dated August 22, 2008, the Commission opened this investigation:

to inquire into the status of PSNH's efforts to install scrubber technology; the costs of such technology; and the effect installation would have on energy service rates (previously referred to as default service charge) for PSNH customers.

Letter from Executive Director, Debra Howland to Robert A. Bersak, August 22, 2008, at 1.

TransCanada is an owner of hydroelectric generating facilities. TransCanada Motion, at ¶ 1. TransCanada does not allege that it is a customer of PSNH, but even if it was, being a

customer does not automatically confer status as a person suffering injury in fact. See discussion below. TransCanada correctly admits that it is not a party to this proceeding, but alleges that it is directly affected by the decision. TransCanada complains that the statute is not fair because PSNH is a regulated utility and TransCanada is not. TransCanada Motion, ¶ 9. In its Motion, TransCanada correctly notes that a requirement for an entity to have standing to file a Motion for Rehearing under RSA 541:3 is that the entity must be “directly affected” by the Order in question. TransCanada fails to meet this requirement. It alleges that it has standing to file a rehearing motion because

...TransCanada and other merchant generators in NH have no...assurance that they will be paid for any investments and capital improvements they make to their generating facilities. In other words, unlike PSNH, TransCanada assumes the risk of any poor decisions or cost overruns associated with operating and maintaining its assets.

TransCanada Motion, ¶ 9

The “harm” that TransCanada alleges it may suffer (*i.e.*, being treated differently than a regulated public utility with cost-of-service based generation) was voluntarily accepted by it when it acquired its generation assets. As noted in its Motion, TransCanada purchased its generating assets from USGen New England, Inc. in April of 2005. RSA 369-B:3-a, requiring PSNH to retain, rather than divest, its generating assets, was enacted into law two years earlier, during the 2003 legislative session. 2003 N.H. Laws, Chapter 21. At the time TransCanada agreed to purchase its generating assets, TransCanada knew, or should have known, the state of the law. Nothing has changed that alters the state of the market in New Hampshire that TransCanada voluntarily accepted when it purchased its generating assets. Moreover, TransCanada’s ability to do business is not limited solely to New Hampshire; it has the right and ability to sell its generating output throughout New England, as well as to other markets (such as New York and PJM).

TransCanada misstates the public utility regulatory environment under which PSNH operates. PSNH is not immune from disallowance of costs for poor decisions or cost overruns. PSNH is only allowed to recover its actual, prudent and reasonable costs through the default energy service charge, including the prudent costs of complying with RSA 125-O:11, *et seq.* RSA 369-B:3, IV(b)(1)(A); RSA 125-O:18. Those prudent costs are limited by the competitive market for the requisite scrubber technology. PSNH will ultimately have to show that it took reasonable and prudent actions to achieve the best combination of

technology and performance for the price. PSNH is only allowed an opportunity to earn a regulated rate of return, which by definition is not the same as what could be expected in the competitive environment in which TransCanada operates. TransCanada is not directly affected by the Commission's decision because it suffers and will suffer no injury in fact. *Appeal of Richards*, 134 N.H. 148, 155 (1991). TransCanada does not gain standing to file a motion for rehearing merely because it alleges potential harm to others. *Id.*, 134 N.H. at 157, citing *Blanchard v. Railroad*, 86 N.H. 263, 264-266 (1933).

If TransCanada truly is desirous of being treated in a manner identical to PSNH, it has the right to seek public utility status under RSA 362:4-c, II if it so chooses. TransCanada's failure to seek such status under RSA 362:4-c, II shows that its complaint is not about disparate treatment; instead, it is attempting to use this proceeding to manipulate PSNH's continued ownership of low cost generation to facilitate its sale of higher-cost generation to New Hampshire consumers. Thus, TransCanada has no legitimate basis for its claims, and it therefore lacks standing to request rehearing of the Commission's decision.

3. The Commercial Ratepayers

The Commercial Ratepayers also suffer no injury in fact now or in the future. PSNH will be permitted to recover only its prudent investment and reasonable operating costs through its default energy service charge. RSA 125-O:18. The Commercial Ratepayers already have the option of avoiding PSNH's default energy service charge entirely by purchasing energy from a competitive, unregulated energy supplier. There are nearly two dozen competitive suppliers listed on the Commission's web site as of the date of this objection, with all but two indicating a readiness and willingness to serve customers of PSNH. *See*, <http://www.powerischoice.com/pages/supplier.html>. One of those competitive suppliers, TransCanada Power Marketing Ltd., is an affiliate of TransCanada Hydro Northeast, Inc. (Perhaps the Commercial Ratepayers and TransCanada could meet and resolve their respective alleged harms via a mutually satisfactory energy supply arrangement.)

The Commercial Ratepayers may not gain standing when asserting injury to the public at large without demonstrating a direct injury. *Appeal of Richards, supra* at 157-158 citing *Blanchard v. Railroad*, 86 N.H. 263, 264-266 (1933). As a result of the deregulation of the electric utility industry in New Hampshire and the advent of competitive choice, the situation today is unlike what John Victor Hillberg and the members of the Campaign for Ratepayers

Rights faced in 1991 in *Appeal of Richards*. At that time, those consumers only had one monopoly supplier of electric energy. *Appeal of Richards, supra* at 157-158. Since that decision, rates have been unbundled; if the Commercial Ratepayers are dissatisfied for any reason with PSNH's default energy service, they have the legal right to obtain their electricity from numerous competitive suppliers. Thus, they have a choice as to whether they will share the costs of an environmentally beneficial project which the Legislature has determined is unequivocally in the public interest of the State of New Hampshire. *See*, Commercial Ratepayers' Motion at ¶ 2.2.

"In order to have standing to appeal a decision of an administrative agency denying a motion for rehearing, an appellant must demonstrate that the appellant has suffered or will suffer an injury in fact." *In re Londonderry Neighborhood Coalition*, 145 N.H. 201, 203 (2000), citing to *Appeal of Richards*. Because the harm that the Commercial Ratepayers allege is merely speculative, they lack standing to seek rehearing.

B . Procedural Scope

According to the Commission's Letter from Executive Director, Debra Howland to Robert A. Bersak, dated August 22, 2008, the Commission initiated its inquiry in this matter under RSA 365:5 and 365:19:

RSA 365:5 Independent Inquiry.

The commission, on its own motion or upon petition of a public utility, may investigate or make inquiry **in a manner to be determined by it** as to any rate charged or proposed or as to any act or thing having been done, or having been omitted or proposed by any public utility; and the commission shall make such inquiry in regard to any rate charged or proposed or to any act or thing having been done or having been omitted or proposed by any such utility in violation of any provision of law or order of the commission. (Emphasis added)

RSA 365:19 Independent Investigation.

In any case in which the commission may hold a hearing it may, before or after such hearing, make such independent investigation **as in its judgment the public good may require**; provided, that, whenever such investigation shall disclose any facts which the commission shall intend to consider in making any decision or order, such facts shall be stated and made a part of the record, and any party whose rights may be affected shall be afforded a reasonable opportunity to be heard with reference thereto or in denial thereof. (Emphasis added)

The Commission is specifically empowered by RSA 365:5 to determine the manner in which it conducts an inquiry. The manner in which the Commission determined to conduct

this inquiry under RSA 365:5 included a request for legal memoranda from both PSNH and the Office of Consumer Advocate (“OCA”) on the threshold issue of whether the Commission had the authority to conduct a public interest review under RSA 369-B:3-a given the later enactment of RSA 125-O:11, *et seq.*

The Commission found it “lacks the authority to make a determination pursuant to RSA 369-B:3-a as to whether this particular modification is in the public interest.” Order, slip op. at 13. TransCanada and the Commercial Ratepayers have offered no new grounds in their motions beyond the arguments that the OCA supplied in its memorandum concerning the Commission’s authority to conduct a public interest review. The Commission conducted and concluded its inquiry under relevant statute in the manner that it determined. No substantive grounds for rehearing have been made. RSA 541:3.

Order No. 24,898 did not “disclose any facts which the commission shall intend to consider in making any decision or order.” RSA 365:19. The Order was a legal analysis involving a “question of law...concern[ing] the interpretation of two statutory provisions, namely, RSA 369-B:3-a and RSA 125-O:11.” Order, slip op. at 4. No due process rights attach to an investigation under RSA 365:19 under these circumstances. In such an inquiry, the Commission is free to conduct the investigation “as in its judgment the public good may require.” Once again, the Commission conducted and concluded its inquiry under relevant statute in the manner as in its judgment the public good may require. No substantive grounds for rehearing have been made. RSA 541:3.

TransCanada complains that the proceeding has risen to the level of a contested case, and that therefore, the Commission must conduct an adjudicatory hearing under RSA 541-A:31. A “[c]ontested case’ means a proceeding in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after notice and an opportunity for hearing.” RSA 541A:1, IV. The Commission merely opened an inquiry under RSA 365:5 in a manner it has clear discretion to determine, and found that it has no legal authority to conduct a public interest inquiry into the installation of scrubber technology at Merrimack Station.

PSNH’s duty to install scrubber technology was not determined by the agency – that duty is mandated unequivocally by law. As noted in PSNH’s Memorandum of Law, “The Scrubber Law, codified at RSA 125-O:11 through 125-O:18, is clear, straightforward, and unambiguous in its mandate.” PSNH is required to construct and install the scrubber technology as mandated by RSA 125-O:11, *et seq.* Therefore, no rights, duties, or privileges

were determined by the Commission; as noted in the Order, the Commission has no authority to make such determinations. There is simply no basis under law to request an adjudicatory proceeding for this matter, nor any authority granted to the Commission by the Legislature to hold such a proceeding.

C. The Motion of the Commercial Ratepayers fails to comply with the requirements of RSA 541:4

In its Motion at ¶ 2.8, the Commercial Ratepayers state that they are incorporating the points raised by the OCA, Conservation Law Foundation, and TransCanada as further grounds to support its Motion. Such a general “incorporation by reference” of unidentified issues does not comply with the requirements of RSA 541:4. RSA 541:4 requires that a motion for rehearing “shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. In *Re Public Service Company of New Hampshire*, 88 NHPUC 52, 54 (2003), the Commission, citing to *Appeal of Coffey*, 144 N.H. 531, 534 (1999), noted, “ambiguous and unfocussed references in a rehearing motion are insufficient to preserve these issues for appeal.”

To the extent that the Commercial Ratepayers have failed to “set forth *fully every ground* upon which [they] claimed that the...order was unlawful or unreasonable,” it has failed to properly preserve those claims for appeal. In *re Walsh*, 156 N.H. 347, 352 (2007) (emphasis in original). The law does not require either the Commission or PSNH to guess at what other claims the Commercial Ratepayers might be referring to, but which they did not set forth fully in their Motion.

III. Substantive Issues

A. Scope of the Commission’s Authority in this Matter

The substance of Order No 24,898 is that the Commission lacks authority over the installation of scrubber technology at Merrimack Station. The Order correctly notes “the Commission’s authority is limited to determining at a later time the prudence of the costs of complying with the requirements of RSA 125-O:11-18 and the manner of recovery for prudent costs.” Order, slip op. at 13. The Commission therefore has no authority to act further regarding this matter at this point in time.

In its Motion for Rehearing, TransCanada declared that the Commission has “plenary authority” over PSNH and thereby has the legal ability to exert authority over PSNH

whenever and wherever it deems appropriate. As demonstrated in PSNH's Memorandum filed on September 2, 2008, the Commission's authority is not plenary. The Commission, in Order No. 24,898 and many times before, has acknowledged that its authority is limited to that delegated to it by the Legislature. As noted in PSNH's Legal Memorandum:

[P]recedents clearly and consistently note that "the regulation of utilities...is the unique province of the legislature"; the Commission "derives its authority from powers delegated by the legislature"; "[t]he...commission is an agency of limited powers and authority"; and, "the authority of the PUC...is limited to that specifically delegated or fairly implied by the legislature and may not be derived from other generalized powers of supervision." These holdings detail the limits of the Commission's authority and form the bases for any discussion concerning the nature and extent of the Commission's authority relative to the Merrimack Station scrubber project.

The Commission essentially performs a legislative function and is granted no other powers than those prescribed by law.

The confusion over the scope of the Commission's authority perhaps comes from the fact that the New Hampshire Supreme Court has noted that in matters relating to ratemaking, the Commission has plenary authority.¹ "The statutory scheme dictates that *the commission's ratemaking power* 'is plenary save in a few specifically excepted instances.'" *Legislative Utility Consumers' Council v. Public Service Co.*, 119 N.H. 332, 341 (1979); *Lorenz v. Stearns*, 85 N.H. 494, 506 (1932) (emphasis added). "Except in narrowly defined instances, *the ratemaking power of the commission* is plenary." *Bacher v. Public Service Co.*, 119 N.H. 356, 357 (1979). The limitation to ratemaking matters for "plenary" authority held by the Commission was perhaps best set forth in *State v. New England Telephone & Telegraph Co.*, 103 N.H. 394, 397 (1961): "While the authority of the Commission 'does not extend beyond expressed enactment or its fairly implied inferences' (*Petition of Boston & Maine R. R.*, 82 N.H. 116), as was pointed out in *State v. N. H. Gas & Elec. Co.*, [86 N.H. 16], 30 [(1932)], the authority of the Commission to regulate rates 'is plenary save in a few specifically excepted instances.'" (Emphasis added.)

¹ Even the Commission's ratemaking powers have specific limits. The New Hampshire Supreme Court was faced with a situation analogous to this case in *Petition of Public Service Company*, 130 N.H. 265 (January 26, 1988). The court found that the Commission could not entertain PSNH's request for emergency rate relief under RSA 378:9 because the basis for the emergency was PSNH's construction works in progress. Even with so-called plenary ratemaking powers, the Commission could not employ the earlier enacted emergency rate statute to supersede the later enacted specific anti-CWIP statute. PSNH filed for bankruptcy protection on January 28, 1988.

This docket does not pertain to ratemaking. This docket involves an inquiry into the Commission's authority to weigh-in on actions mandated by law. The repeated references to, and reliance upon, the Commission's "plenary" authority is misplaced. The Commission correctly noted in its decision, "the Commission lacks the authority to make a determination pursuant to RSA 369-B:3-a as to whether this particular modification is in the public interest." Order, slip op. at 13.

B. Separation of Powers

The Commercial Ratepayers' Motion at ¶ 2.3 states that the Commission's "decision violates constitutional principles of separation of power....That is, the Commission's decision has the effect of ascribing to the Legislature a power that properly resides only in the Commission in the exercise of its executive power and/or quasi-judicial powers." This proposition of the Commercial Ratepayers' is just plain wrong. The law could not be clearer. As noted by the New Hampshire Supreme Court,

The PUC is a creation of the legislature and as such is endowed with *only* the powers and authority which are *expressly granted or fairly implied by statute*. *Petition of Boston & Maine Railroad*, 82 N.H. 116, 116, 129 A. 880, 880 (1925). *Consequently, the authority of the PUC...is limited to that specifically delegated or fairly implied by the legislature and may not be derived from other generalized powers of supervision.*

Appeal of Public Service Co., 122 N.H. 1062, 1066 (1982) (emphases added).

The Commission is granted limited authority by the Legislature, performs a Legislative function, and cannot exceed those powers expressly granted or fairly implied by statute. As noted in PSNH's Memorandum of Law, the United States Supreme Court has held that the regulation of public utilities is a function of the legislative branch of government: "Subject to acknowledged constitutional limitations, the regulation of utilities and the setting of appropriate rates to be charged for public utility products and services is the unique province of the legislature. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313 (1989); *The Minnesota Rate Cases*, 230 U.S. 352, 433 (1913); *LUCC v. Public Serv. Co. of N.H.*, 119 N.H. 332, 340 (1979)." It is incontrovertible that the Commission may not contravene express mandates or findings of the Legislature. The Commission takes its direction from the statutes enacted by the Legislature and can exercise no power other than what has been specifically delegated to it or fairly implied there from.

C. If the Legislature had wanted the Commission to review the public interest of the installation of the scrubber, it would have said so.

The scrubber law, RSA 125-0:11, *et seq.*, does not call for the Commission to make any public interest determinations. As noted in PSNH's Memorandum of Law at p. 17:

In RSA Chapter 362-C, the General Court specifically delegated authority to the Commission to make a determination whether the cited agreement [relating to the bankruptcy reorganization of PSNH] "would be consistent with the public good." RSA 362-C:3. In the Scrubber Law, no such delegation of authority to the Commission is included; the General Court itself has determined that installation of a scrubber "is in the public interest of the citizens of New Hampshire and the customers of the affected sources." Had the Legislature intended to delegate such authority to the Commission, it certainly knew how to do so, as it had done in the past...

The Commission's decision in Order No. 24,898 was correct and consistent with the intent of the Legislature.

IV. Conclusion

The Motions for Rehearing provide no legal basis for the Commission to revise its legal conclusion regarding its limited authority concerning installation of scrubber technology at Merrimack Station. The law's mandate requiring PSNH to install scrubber technology as soon as possible, and the public interest findings made by the Legislature in support of that mandate, are clear and unequivocal. For the reasons set forth in its original decision in Order No. 24,898, the Commission should deny the two Motions for Rehearing.

Respectfully submitted this 23rd day of October, 2008.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

By: 

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CERTIFICATE OF SERVICE

I certify that on this date I caused the attached Memorandum of Law to be served pursuant to N.H. Code Admin. Rule Puc 203.11. I have also served Douglas L. Patch, Esq., Edward A. Haffer, Esq., and Mr. Edward M. B. Rolfe who are not on the Commission's service list for this docket.

October 23, 2008



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